APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 291—October Term, 1955.

(Argued March 15, 1956 Decided May 15, 1956)

Docket No. 23987

LEO WALTON,

Plaintiff-Appellant,

—v.—

ARABIAN AMERICAN OIL COMPANY,

Defendant-Appellee.

Before:

FRANK, LUMBARD and WATERMAN,

Circuit Judges

Appeal from a judgment, of the United States District Court for the Southern District of New York, entered by Judge Bicks. Affirmed.

O'NEILL, HIGGINS & LATTO (New York, New York), *Attorneys for Plaintiff-Appellant.*

REILLY & REILLY (New York, New York), *Attorneys for Defendant-Appellee.*

FRANK, *Circuit Judge*.

Plaintiff is a citizen and resident of Arkansas, who, while temporarily in Saudi Arabia, was seriously injured when an automobile he was driving collided with a truck owned by defendant, driven by one of defendant's employees. Defendant is a corporation incorporated in Delaware, licensed to do business in New York, and engaged in extensive business activities in Saudi Arabia. Plaintiff's complaint did not allege pertinent Saudi Arabian "law," nor at the trial did he prove or offer to prove it. Defendant did not, in its answer, allege such "law," and defendant did not prove or offer to prove it. There was evidence from which it might have been inferred, reasonably, that, under well-established New York decisions, defendant was negligent and therefore liable to plaintiff. The trial judge, saying he would not take judicial notice of Saudi-Arabian "law," directed a verdict in favor of the defendant and gave judgment against the plaintiff.

1. As jurisdiction here rests on diversity of citizenship, we must apply the New York rules of conflict of laws.[1] It is well established by the New York decisions that the "substantive law" applicable to an alleged tort is the "law" of the place where the alleged tort occurred. See,

1.—Klaxon Co. v. Stentor Electric Mfg. Co., inc., 313 U. S. 487.

e.g., *Conklin* v. *Canadian-Colonial Airways, Inc.*, 266 N. Y. 244, 248. This is the federal doctrine; see e.g., *Slater* v. *Mexican National Railroad Co.*, 194 U. S. 120; *Cuba R. Co.* v. *Crosby*, 222 U. S. 473. This doctrine is often said to be based on the notion that to hold otherwise would be to interfere with the authority of the foreign sovereign.[2]

It has been suggested that, where suit is brought in an American court by an American plaintiff against an American defendant, complaining of alleged tortious conduct by the defendant in a foreign country, and that conduct is tortious according to the rules of the forum, the court, in some circumstances, should apply the forum's tort rules. See Morris, The Proper Law of a Tort, 64 Harv. L. Rev. (1951) 881 (criticizing, *inter alia*, *Slater* v. *Mexican National Railroad*, 194 U. S. 120).[2a] There, and in 12 Modern L. Rev. (1949) 248, Morris decries, as "mechanical jurisprudence," the invariable reference to the "law" of the

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2.—See, e.g., American Banana Co. v. United Fruit Co., 213 U. S. 347, 356.

A variant but related notion is that the foreign sovereign alone has the power to create a legal obligation resulting from an act done within the territory over which it has "jurisdiction," and that, if that sovereign does create such an obligation, that obligation accompanies the person of the defendant everywhere. See, e.g., Western Union Telegraph Co. v. Brown, 234 U. S. 542, 547; Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99. For criticisms of this view, see, e.g., Cook, The Logical and Legal Bases of the Conflict of Law (1942) 7, 311 et seq.; Dodd, 39 Harv. L. Rev. (1926) 533, 536-537.

For a different view, see, e.g., Judge Learned Hand in Guiness v. Miller, 291 Fed. 768, 770; Direction der Disconto-Gesellschaft v. U. S. Steel Corp., 300 Fed. 741, 744.

2a.—Cf. Wightman, J., and Willes, J., in Scott v. Lord Seymour, 1 H & C 219, 233-234, 236, 158 Eng. Rep. 865, 871-873, cited in the dissenting opinion in Slater v. Mexican Nat. R. R. Co., 194 U. S. at 132.

place where the alleged tort happened.[2b] There may be much to Morris' suggestion; and a court—particularly with reference to torts, where conduct in reliance on precedents is ordinarily absent[3]—should not perpetuate a doctrine which, upon re-examination, shows up as unwise and unjust.[4] Although in a diversity case a federal court must apply the "substantive" conflict rules of the state in which the court sits, that duty perhaps does not require acceptance of state court decisions which are clearly obsolescent; see the concurring opinion of Mr. Justice Frankfurter in *Barnhardt* v. *Polygraphic Co., Inc.* U. S. (January 16, 1956).[4a] But we see no signs that the New York decisions pertinent here are obsolescent.[5]

2. The general federal rule is that the "law" of a foreign country is a fact which must be proved.[6] However,

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2b.—Cf. Stumberg, Conflict of Laws (1951) 201 et seq.

3.—Note the reference in Cuba R. Co v. Crosby, 222 U. S. 473, 480 to parties who "enter into civil relations" and to a "rule * * * under which the parties dealt." Those phrases are awkward in their application to what we call torts.

4.—See, e.g., Seavey, The Waterworks Cases and Stare Decisis, 66 Harv. L. Rev. (1952) 84; cf. Denning, The Road to Justice (1955) 6, 92, 98.

4a.—Cf. Cooper v. American Airlines, 149 F. 2d 355, 359 (C. A. 2); Pierce v. Ford Motor Co., 190 F. 2d 910 (C. A. 4); Trowbridge v. Abrasive Co., 190 F. 2d 825 (C. A. 3).

5.—Were this not a diversity case, it might perhaps be appropriate to suggest that the Supreme Court should reconsider the accepted doctrine (as to the complete dominance of the "law" of the place where the alleged tort occurred) which seems to have been unduly influenced by notions of sovereignty a la Hobbes. See Kawananakoa v. Polyblank, 205 U. S. 349, 353 (referring to Hobbes and Rodin), cited in American Banana Co. v. United Fruit Co., 213 U. S. 347, 358; cf. Jaffe, Book Rev., 66 Harv. L. Rev. (1953) 939, 941 as to the reification of the "notion of power."

6.—See, e.g., Black Diamond S.S. Corp. v. Ropert Stewart & Sons, 336

nder F. R. C. P. 43 (a), a federal court must receive evidence if it is admissible according to the rules of evidence of the state in which the court sits. At first glance, then, it may seem that the judge erred in refusing to take judicial notice of Saudi Arabian "law" in the light of New York Civil Practice Act Section 344-a.[7] In *Siegelman* v. *Cunard White Star*, 221 F. 2d 189, 196-197 (C. A. 2), applying that statute, we took judicial notice of English "law" which had been neither pleaded nor proved. Our decision, in that respect, has been criticized;[8] but it may be justified on the ground that an American court can easily comprehend, and therefore, under the statute, take judicial notice

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U. S. 386, 396-397; Cuba R.R. Co. v. Crosby, 222 U. S. 473, 479; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397; U. S. v. Wiggins, 14 Pet. (39 U. S.) 334; Church v. Hubbart, 2 Cranch (6 U. S.) 187, 236-237; Liechti v. Roche, 198 F. 2d 174, 176 (C. A. 5); U. S. ex rel. Zdunic v. Uhl, 137 F. 2d 858, 861 (C. A. 2); Dickerson v. Matheson, 50 Fed. 73, 76 (C. A. 2).

7.—It reads, in part:

> "A. Except as otherwise expressly required by law, any trial or appellate court, in its discretion, may take judicial notice of the following matters of law:
>
> 1. A law, statute, proclamation, edict, decree, ordinance, or the unwritten or common law of a sister state, a territory or other jurisdiction of the United States, or of a foreign country or political subdivision thereof. * * *
>
> C. Where a matter of law specified in this section is judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether the same is offered by counsel, a third party or discovered through its own research.
>
> D. The failure of either party to plead any matter of law specified in this section shall not be held to preclude either the trial or appellate court from taking judicial notice thereof."

8.—Busch, When Law is Fact, 24 Fordham L. Rev. (1956) 646; cf. Sommerich and Busch, 38 Cornell L. Rev. (1953) 125; U. S. v. District

of, English decisions, like those of any state in the United States.[9] However, where, as here, comprehension of foreign "law" is, to say the least, not easy, then, according to the somewhat narrow interpretation of the New York statute by the New York courts,[9a] a court "abuses" its discretion under that statute perhaps if it takes judicial notice of foreign "law" when it is not pleaded,[10] and surely does so unless the party, who would otherwise have had the burden of proving that "law", has in some way adequately assisted the court in judicially learning it.[11]

Director of Immigration, 106 F. 2d 14, 20 (C. A. 2); U. S. v. Uhl, 137 F. 2d 858 (C. A. 2).

9.—For a different possible justification, see Busch, loc. cit. at 649.

An American court may go astray even in taking judicial notice of English "law." The similarity in language may be deceptive by concealing significant differences. Indeed, just because the English language appears the same as the American language (although it is not), an American may understand the former less adequately than he understands German or French, which is more obviously "foreign" and different. See Anon Y. Mous, The Speech of Judges, 29 Va. L. Rev. (1943) 625, 628.

Moreover, the taken-for-granted, unexpressed, background assumptions of English judges and lawyers differ from the unspoken assumptions of American judges and lawyers, and thus may well induce serious misunderstandings. Holmes, J., noted the baffling character of such tacit assumptions in a foreign system like that of Puerto Rico; see Diaz v. Gonsolez, 261 U. S. 102, 105-106. Tacit English assumptions may be even more baffling to an American.

9a.—For criticism of this narrow interpretation, see Nussbaum, Proving the Law of Foreign Countries, 3 Am. J. of Comp. Law (1954) 60-62; cf. Nussbaum, The Problem of Proving Foreign Law, 50 Yale L. J. (1941) 1018, 1023.

10.—Greiner v. Freund, 286 App. Div. 996; Arams v. Arams, 182 Misc. 328; see also the articles cited in note 8, supra.

11.—Sonnensen v. Panama Transport Co., 298 N. Y. 262; Berg v. Oriental Consol. Mining Co., 70 N. Y. S (2d) 19.

3. Plaintiff, however, argues thus: The instant case involves such rudimentary tort principles, that the judge, absent a contrary showing, should have presumed that those principles are recognized in Saudi Arabia; therefore the burden of showing the contrary was on the defendant, which did not discharge that burden.[12] But we do not agree that the applicable tort principles, necessary to establish plaintiff's claim, are "rudimentary": In countries where the common law does not prevail, our doctrines relative to negligence, and to a master's liability for his servant's acts, may well not exist or be vastly different. Consequently, here plaintiff had the burden of showing, to the trial court's satisfaction, Saudi Arabian "law."[13]

This conclusion seems unjust for this reason: Both the parties are Americans. The plaintiff was but a transient in Saudi Arabia when the accident occurred and has not been there since that time. The defendant company engages in extensive business operations there, and is therefore in a far better position to obtain information concerning the "law" of that country.[13a] But, under the New York decisions which we must follow, plaintiff had the burden.

12.—Cuba R. Co. v. Crosby, 222 U. S. 473, 478; Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp., 302 N. Y. 342, 349-350; Ehag Eisenbahnwerte H.A. v. Banca Nat., 306 N. Y. 242, 249; Arams v. Arams, 182 Misc. 328.

13.—See Arams v. Arams, 182 Misc. 328, and the other cases cited in the preceding footnote; see also Whitford v. Panama R. Co., 23 N. Y. 465; Crashley v. Press Pub. Co., 179 N. Y. 27, 32-33; E. Gerli & Co. v. Cunard SS Co., 48 F. 2d 115, 117 (C. A. 2); Ozanic v. U. S., 165 F. 2d 738, 744 (C. A. 2).

13a.—See Nussbaum, 3 Am. J. of Comp. Law (1954) 60, 62; Nussbaum, 50 Yale L. J. (1941) 1018, 1043.

As he did not discharge it, a majority of the court holds that the judge correctly gave judgment for the defendant.

4. In argument, plaintiff's counsel asserted that Saudi Arabia has "no law or legal system," and no courts open to plaintiff, but only a dictatorial monarch who decides according to his whim whether a claim like plaintiff's shall be redressed, *i.e.*, that Saudi Arabia is, in effect, "uncivilized." According to Holmes, J.—in *Slater* v. *Mexican National R. Co.*, 194 U. S. 120, 129, in *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 355-356, and in *Cuba R. Co.* v. *Crosby*, 224 U. S. 473, 478—the *lex loci* does not apply "where a tort is committed in an uncivilized country" or in one "having no law that civilized countries would recognize as adequate." [14] If such were the case here, we think the New York courts would apply (and therefore we should) the substantive "law" of the country which is most closely connected with the parties and their conduct—in this case, American "law." [14a] But plaintiff has offered no data showing that Saudi Arabia is thus "uncivilized." We are loath to and will not believe it, absent such a showing.

14.—Cf. Dicey, Conflict of Laws (2d ed.) 726, cited in American Banana Co. v. United Fruit Co., 213 U. S. 347, 356. The latest or 6th edition of Dicey (1949) 805 repeats the statement.

14a.—This is in line with the idea that the "proper law" is that of the place of paramount contacts, as to which see Cheatham, Goodrich, Griswold and Reese, Cases and Materials on Conflict of Law (3d ed. 1951) 420 et seq; cf. 204, 239-240; Cavers, A Critique of The Choice of Law Problem, 47 Harv. L. Rev. (1933) 173, 191-193.

As the tort rules, pertinent here, of New York, Delaware and Arkansas are doubtless substantially similar, there would be no need to choose one or the other.

5. The complaint in this action was filed on May 10, 1949. Pre-trial hearings were held before Judge Conger on December 2, 1952; January 7, 1953; March 31, 1953; and April 10, 1953. At these hearings the question of proving Saudi-Arabian law was discussed. When the case came on for trial on November 7, 1953 Judge Bicks indicated that in his view the burden was on the plaintiff to prove the foreign law. When the plaintiff's counsel said that he was not prepared to prove the law of Saudi-Arabia, Judge Bicks proposed that the case be adjourned long enough to allow the plaintiff to prepare such proof. It was agreed that the case be put over for two days to enable the plaintiff to decide whether to request an adjournment for that purpose.

When the hearing resumed on November 9, plaintiff's counsel unequivocally took the position that he did not wish to prove the foreign law and wanted no adjournment. He chose to rely on the applicability of New York law. To that end he proposed that he proceed to present his case in order to make a record for appeal. The plaintiff's evidence as to liability was presented and on a proper motion the judge dismissed the complaint. He specifically ruled that he would not take judicial notice of the law of Saudi-Arabia and that the plaintiff's failure to prove that law required dismissal.

Since the plaintiff deliberately refrained from establishing an essential element of his case, the complaint was properly dismissed. The majority of the court thinks that, for the following reasons, it is inappropriate to remand the case so that the plaintiff may have another chance: He had abundant opportunity to supply the missing element and chose not to avail himself of it. It does not appear whether Judge Bicks or counsel for the parties considered

the application of Section 344-a of the New York Civil Practice Act. Since Judge Bicks specifically determined that he would not take judicial notice of the Arabian law, he must have considered that in some circumstances he might take judicial notice of foreign law. But in any event, as we have pointed out, it would have been an abuse of discretion under the New York cases to take notice of the foreign law here. The judgment of dismissal must therefore be affirmed.

The writer of the opinion thinks we should remand for this reason: Apparently neither the trial judge nor the parties were aware of New York Civil Practice Act, Section 344-a; consequently, in the interests of justice,[15] we should remand with directions to permit the parties, if

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15—Estho v. Lear, 7 Pet. (32 U. S.) 130; Ford Motor Co. v. NLRB, 305 U. S. 364, 373; U. S. v. Rio Grande Dam & Irrigation Co., 184 U. S. 416, 423-424; Porter v. Leventhal, 160 F. 2d 52, 59 (C. A. 2) and cases there cited; Benz v. Celeste Fur Dyeing & Dressing Corp., 136 F. 2d 845 (C. A. 2); Nachman Spring-Filled Corp. v. Kay Mfg. Co., 139 F. 2d 781, 787 (C. A. 2).

See also Usatorre v. The Victoria, 172 F. 2d 434 (C. A. 2); Sonnenson v. Panama Transport Co., 298 N. Y. 262, 267; Sommerich, 4 Am. J. of Comp. Law (1955) 453.

they so desire, to present material which may assist the trial judge to ascertain the applicable "law" of Saudi-Arabia.[16]

Affirmed.

16.—Or that it has no "civilized" legal system; see point 4 of the text.

Nussbaum, 3 Am. J. of Comp. Law (1954) 60, 63-64—criticising Usatorre v. The Victoria, 172 F. 2d 434 (C. A. 2)—points to an important fact: the prohibitive expense to a party of modest financial means in obtaining an expert to explain foreign "law." Subsequently (pp. 66-67), Nussbaum suggests that the trial judge call his own expert; the judge, says Nussbaum, would require the parties to advance the expert's fee, or, "if this is not feasible, the court (hence eventually the losing party), may be charged with the fee as part of the court's business." But, as matters now stand; this solution is not feasible: In a federal criminal case, a trial judge may call upon his own expert whom the government will pay; see Criminal Rule 28. However, in a civil case (at any rate, one to which the government is not a party) the government has no authority to pay an expert; and the use of the device of taxing the expert's fee as part of the costs to the losing party may be beyond the judge's power (absent a statute); in any event, the expert will go unpaid if the losing party has not the funds to pay such costs.

In the instant case, a letter from Hon. Raymond T. Yingling, Assistant Legal Adviser of the U. S. Department of State, suggests to the writer that, with little or no expense, the parties probably could procure some information as to the pertinent legal rules of Saudi Arabia; perhaps, also, further information could be procured without expense from officials of The United Nations.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of May one thousand nine hundred and fifty-six.

Present:

HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

LEO WALTON,
Plaintiff-Appellant,

—v.—

ARABIAN AMERICAN OIL COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Judgment

The cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Filed:
May 15, 1956

A. Daniel Fusaro,
Clerk.

No. 308

FILED
AUG 10 1956
JOHN T. FEY, Clerk

United States Court of Appeals
FOR THE SECOND CIRCUIT

Civil Action No. 50-170

LEO WALTON,

Plaintiff-Appellant,

—against—

ARABIAN AMERICAN OIL COMPANY,

Defendant-Appellee.

APPENDIX TO APPELLANT'S BRIEF

O'NEILL, FIGGINS & LATTO,
Attorneys for Plaintiff-Appellant,
No. 309 Lexington Avenue,
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City of New York.

UNITED STATES COURT OF APPEALS
FILED
FEB 15 1956
DANIEL FINKELSTEIN
SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Civil Action No. 50-170

LEO WALTON,
Plaintiff-Appellant,

—against—

ARABIAN AMERICAN OIL COMPANY,
Defendant-Appellee.

Statement Under Rule 15 (b)

Action commenced by plaintiff in the United States District Court, Southern District of New York, by the filing of a complaint and the issuance of a summons, and the service of the summons and complaint on the defendant on May 10, 1949.

Issue was joined by the service and filing of the defendant's answer on June 23, 1949.

The issues were tried before the Hon. Alexander Bicks and a jury on November 7 and 9, 1955. At the close of the plaintiff's case the defendant moved to dismiss the plaintiff's complaint, and the Trial Court granted the defendant's motion to dismiss the plaintiff's complaint.

Judgment was entered in favor of the defendant on November 15, 1955.

The plaintiff filed his notice of appeal from each and every part of the judgment on November 30th, 1955.

The plaintiff appeared by his attorneys, O'NEILL, HIGGINS & LATTO, of 369 Lexington Avenue, New York City, N. Y.

The defendant appeared by its attorneys, CLARKE & REILLY, of 233 Broadway, New York City, N. Y.

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 50-170

Plaintiff demands a trial by jury.

LEO WALTON,
Plaintiff,

—against—

ARABIAN AMERICAN OIL COMPANY,
Defendant

Plaintiff complaining of the defendant alleges as follows upon information and belief:

1. That at all the times herein mentioned the defendant, Arabian American Oil Company, was and now is a foreign corporation organized under and existing by virtue of the laws of the State of Delaware.

2. That prior to the institution of this action the defendant, pursuant to the General Corporation Law of the State of New York applicable to foreign corporations, filed a statement and application for authority to do business within the State of New York, and received authority and qualified to do business within the State of New York from the Secretary of State of the State of New York, and designated the Secretary of State of the State of New York as its agent upon whom all process in any action or proceeding against it may be served within this State, and that the same is now in full force and effect.

3. That the defendant, Arabian American Oil Company, is engaged in business in the City, County and State of New York, and within the territorial limits of the jurisdiction of the United States District Court for the Southern District of New York.

4. That the plaintiff, Leo Walton, is a citizen and resident of the State of Arkansas.

5. That jurisdiction herein is founded upon diversity of citizenship between the plaintiff and defendant, in that the plaintiff is a citizen and resident of the State of Arkansas and the defendant is a citizen of the State of Delaware. That the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

6. That on January 5, 1947, and at the times and places herein mentioned, at Dhahran, Saudi Arabia, a Saudi Arab, A. Rahman bin Khidhir, bearing defendant's identification No. 21951, was the agent, servant and employee of the defendant.

7. That at the time and place herein mentioned the defendant owned Diamond T Truck No. 2X363.

8. That at the time and place herein mentioned the defendant by its agents, servants and employees, operated, maintained and controlled Diamond T Truck No. 2X363, which was being operated on the business of said defendant.

9. That on January 5, 1947, at the times and places herein mentioned, said Saudi Arab, A. Rahman bin Khidhir, bearing defendant's identification No. 21951, was operating Diamond T Truck No. 2X363 as the agent, servant and employee, and on the business of the defendant, Arabian American Oil Company.

10. That on January 5, 1947, on the Dhahran—Al Khobar Road, Dhahran, Saudi Arabia, the defendant's motor vehicle aforesaid came in contact and collision with a motor vehicle in which this plaintiff was riding.

11. That at said time and at said place the defendant, its agents, servants and employees, so negligently and carelessly operated the aforesaid motor vehicle bearing No. 2X363 at a dangerous and excessive rate of speed, without keeping a vigilant lookout and without giving any adequate warning of its approach, and so negligently and carelessly failed and omitted to properly guide and control the same, and so negligently and carelessly caused and permitted said motor vehicle to be and remain upon the wrong side of the highway, and so negligently and carelessly failed and omitted to have proper lights, and so negligently and carelessly maintained the

brakes and appliances of said motor vehicle in a defective, dangerous and worn-out condition, that as a result thereof said motor vehicle came in violent contact and collision with the motor vehicle in which the plaintiff was riding, and he thereby sustained serious, severe, painful and permanent injuries to his body, health, organs, nerves and nervous system, and he has spent and will be obliged to spend sums of money in endeavoring to cure himself of his said injuries, and he has lost and will lose his wages at his usual vocation, all to his damage in the sum of $150,000.00, and all being caused as a result of the negligence of this defendant, its agents, servants and employees, and without any negligence on the part of the plaintiff in anywise contributing thereto.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $150,000.00, together with the costs and disbursements of this action.

O'NEILL, HIGGINS & LATTO,
By JOHN V. HIGGINS,
(A member of the firm),
Attorneys for Plaintiff,
369 Lexington Avenue.
Manhattan, New York City.

Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant answering the complaint by CLARKE & REILLY, its attorneys, respectfully shows to this Court and alleges:

First: Admits the allegations contained in paragraphs marked "1", "2", "3" and "7" of said complaint.

Second: Answering paragraphs of said complaint marked "4" and "5", the defendant admits that it is a citizen of the State of Delaware and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00, and except as herein expressly admitted, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs of the complaint.

Third: Answering paragraph of said complaint marked "6", the defendant admits that on January 5, 1947, and at the times and places mentioned in the complaint, A. Rahman bin Khidhir, with identification No. 21951, was an employee of this defendant, and except as herein expressly admitted, denies each and every allegation contained in said paragraph of the complaint.

Fourth: Answering paragraph of said complaint marked "8", the defendant admits that at the time and place mentioned in the complaint, truck No. 2X363 was operated by one of its employees and on the business of this defendant, and except as herein expressly admitted, denies each and every allegation contained in said paragraph of the complaint.

Fifth: Answering paragraph of said complaint marked "9", the defendant admits that at the times and places mentioned in the complaint, A. Rahman bin Khidhir, identification No. 21951, operated truck No. 2X363, as an employee of the Arabian American Oil Company and on the business of said Company, and except as herein expressly admitted, denies each and every allegation contained in said paragraph of the complaint.

Sixth: Answering paragraph of said complaint marked "10", the defendant admits that on January 5, 1947, on the Dhahran-Al Khobar Road, Dhahran, Saudi Arabia, the defendant's motor vehicle, bearing No. 2X363, was in contact with a motor vehicle which was then and there operated by Leo Walton, the plaintiff herein, and except as herein expressly admitted, denies each and every allegation contained in said paragraph of the complaint.

Seventh: Denies each and every allegation contained in paragraph numbered "11" of said complaint.

AS A FIRST, SEPARATE AND DISTINCT DEFENSE TO THE ALLEGED CAUSE OF ACTION:

Eighth: Defendant alleges that the injuries com-

plained of in the complaint at the time and place or on the occasion mentioned therein were caused in whole or in part or were contributed to by the negligence and want of care of the plaintiff and not by any negligence or fault or want of care on the part of the defendant.

WHEREFORE, defendant demands judgment against the plaintiff dismissing the complaint herein, together with the costs and disbursements of this action.

CLARKE & REILLY,
By THOMAS A. CLARKE,
(A member of the firm)
Attorneys for Defendant,
233 Broadway,
Manhattan, New York City.

Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 50-170

LEO WALTON,
Plaintiff,

—against—

ARABIAN AMERICAN OIL COMPANY,
Defendant

Before:

HON. ALEXANDER BICKS,
District Judge.

New York, November 7, 1955.
10:30 o'clock a. m.

APPEARANCES:

O'NEILL, HIGGINS & LATTO, ESQS.,
Attorneys for Plaintiff;
JOHN V. HIGGINS, ESQ.,
Of Counsel.

CLARKE & REILLY, ESQS.,
Attorneys for Defendant;
JOHN G. REILLY, ESQ.,
Of Counsel.

The Court: Gentlemen, in examining the pleadings, I note that this is a claim based on negligence which arose in Saudi Arabia.

Will there be any conflict between you as to what the law of Saudi Arabia is?

Mr. Higgins: I will answer you, your Honor, that as far as the plaintiff is concerned we have not pleaded the law of Saudi Arabia; that we have pleaded an action in tort and are prepared to proceed on the basis of common law negligence and on the established law of this country as laid down in all of the cases.

With reference to Judge Holmes' expression in the Cuba Railway case, 222 U. S., it is said in dealing with rudimentary principles of law, which he mentioned as contracts and torts committed abroad, that the courts would assume a liability to exist.

In another case it has been said, in the summary of the law, that if a tort is alleged it would be assumed that in any civilized country the obligation to respond for the tort would be recognized and would give rise to a right of action and liability.

I say also that I refer to the fact that the plaintiff, in his pleadings, has nowhere pleaded any foreign law, and the defendant in its pleadings, in its answer, has not pleaded any foreign law, and in order to raise an issue on the foreign law they have to plead it.

So I say that this is just no different from any other case that we have. We would testify as to how this accident happened. They can make any claims they want as to how they think it happened, and it is just an issue of negligence and contributory negligence on the part of the defendant.

Mr. Reilly: It is the defendant's position that in this, as in any other case, it is the law of the place where the accident occurs that governs; that the only time that the Court can indulge itself in any presumption is when the law of that forum is the same as the one in which the case is being tried, or this forum, where it is well known and obvious that the law of the lex loci follows the common law system.

This obviously is not the fact in this case since there can be no contention that the law of Saudi Arabia follows the common law system, and it has never been held so.

We say that a leading case on the subject, and one in point, is the case in which Mr. Justice Holmes wrote an opinion, Cuba Railway Company v. Crosby, at 222 U. S. 473.

That was a personal injury case, the accident happening in Cuba. Crosby sued in the United States claiming that after warning his employer of defective machinery he was ordered to continue using it and that repairs would be made later.

The tort alleged was one well known to the common law.

The complaint pleaded no foreign law and no proof of the law of Cuba was offered by the plaintiff.

The trial judge applied the common law. A verdict was reversed and the complaint dismissed since the plaintiff had not sustained his burden.

There Judge Holmes again reaffirmed what is elementary, we think, that the lex loci delicti applied, and in a portion of his opinion said:

> "With very rare exceptions the liabilities of parties to each other are fixed by the law of the

territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. That and that alone is the foundation of their rights."

And he then cited the case of American Banana Company v. United Fruit Company, 213 U. S. 447, the citation at 456.

And so we say that it is the plaintiff's burden to establish that the Saudi Arabian law permits a recovery from the employer under the circumstances here.

The Court: Mr. Reilly, while Mr. Higgins hasn't so expressedly stated it, I am sure he recognizes that it is the established law, lex loci delicti, which will govern in this case.

The problem is, however, upon whom is the burden of proving what that law is, or may the Court assume that the law of Saudi Arabia is the same as the law of the State of New York?

Mr. Higgins makes the point that he did not plead foreign law. That is not of significance because you did not have to plead the legal basis for your claim. You just set forth the facts, the claim upon which relief is to be granted, and it was not necessary to plead foreign law at all.

The problem here narrows itself down to upon whom is the burden of proving the law of Saudi Arabia, or may the Court indulge in the assumption that the law of Saudi Arabia is the law of New York.

Now in the Court's research on this problem over the week-end—anticipating that this problem might arise—the Court was not able to find a single case where such an assumption was indulged in, where the action

was just an ordinary action for negligence.

There is a lot of general language, and it is interesting that both of you distinguished gentlemen rely upon the same cases in support of your respective positions, the Cuban Railway case by Mr. Justice Holmes.

It is interesting, too,—and we mustn't overlook it —that the language both of you rely on is wholly dictum in that case.

Now, let us take that language and consider that as well as the cases that have come down after the Cuba Railway case.

Mr. Justice Holmes stated, in effect, that if it was one of the rudimentary torts there would be an assumption that any civilized country would adopt our law, but there can be no such assumption here—not because there is any suggestion that Saudi Arabia is not a civilized country, but we know that it is not a common law country, and we know, too, that in some of the Near East countries they have a different rule of damages, a different measure of damages.

Now the measure of damages, if there is a different measure of damages in Saudi Arabia, would be a matter of substantive law, and we would have to apply that law as well as all the other laws of Saudi Arabia after we went into the facts of this case.

Now, they may not permit a recovery for so-called moral damages, that is, pain and suffering. They may wholly limit it to monetary damages, as some of those Near Eastern countries seem to do.

The Court, in its independent investigation, and without the benefit, unfortunately, of briefs by either counsel, found cases along this line, where there was the application of the assumption doctrine, so-called, where there was injury to an American citizen on the

high seas aboard a foreign-flag vessel.

In the very case you rely on, Mr. Higgins, in an opinion by Mr. Justice Walters of the New York Supreme Court, he points out that in Peru and in Brazil recovery is not permitted in negligence cases, or that we will not assume—I don't recall exactly; it is either that or that we will not assume that the law of Peru and the law of Brazil, citing two cases there, is the law, is the same as our common law that we adopt in New York in ordinary negligence cases.

My view is that the burden will be upon the plaintiff to establish as a fact the law of Saudi Arabia and absent such proof the plaintiff will not make out a case, and will require the complaint to be dismissed.

Off the record.

(Discussion off the record.)

Mr. Higgins: Your Honor has just stated that in your rule that the plaintiff has the burden of establishing what the law of Saudi Arabia is, and that you would proceed on the basis of taking the proof if the plaintiff was not prepared—the other proof in the event the plaintiff was not prepared to prove Saudi Arabian law, to proceed with the other part of the case.

My reply at this moment is this: that the plaintiff has instituted this action by a complaint which does not plead Saudi Arabian law, and has relied on plaintiff's contention that the legal doctrine is to the effect that in a rudimentary tort—negligence certainly is the most rudimentary of torts—that it would be presumed that in any civilized country the law would be the same as here, and that we would try the case on the general common law doctrine of negligence, saying the plaintiff has not pleaded any Saudi Arabian law. I also state

that the defendant's answer, which is the only other pleading in this case, does not plead any Saudi Arabian law or set up any Saudi Arabian law either, and proceeding on that theory I am in no way prepared at the moment to introduce any proof on the question of what the law of Saudi Arabia is.

In view of the plaintiff's position, there is also a serious legal question as to whether the plaintiff should in any way introduce any such proof or even according to our theory whether he would have the right to introduce any such proof in view of the state of the pleadings.

The Court: Do I hear you make any application Mr. Higgins, or do you stand upon your legal position and just wish to proceed based upon your legal position?

Mr. Higgins: At the moment plaintiff is not in a position to say to the Court that it can have proof today or Wednesday or at the conclusion of any other proof in this case, because so far as I know the plaintiff is a witness and the doctor is a witness and the hospital and other records will be introduced.

The plaintiff would be in no position, even under your Honor's ruling, to proceed with any proof of Saudi Arabian law, of course, which we say, in the position we take, we should not be obliged to prove or rely on.

The Court: Well, certainly, Mr. Higgins, the Court does not want to put the plaintiff in a position where he is to be deprived of any remedy because counsel was not prepared to meet this ruling on the law, and if you think that you need more time, why then, if

you would like to make an application for an adjournment we will consider it.

Mr. Higgins: Well, I do, your Honor. I would like to make an application for an adjournment a week from Monday to see what we can do on this question, or see what our position is on it.

The Court: Do you think that will be sufficient time?

Mr. Higgins: I know it is going to be a difficult problem. It would be better if I had a month, but I don't want to—

The Court: If you want I will send it back to Judge Ryan on the calendar, and he can assign it then in the regular way, or he will take such action on your application for adjournment that he does upon similar applications.

While this case is in the part before me I should take action upon an application for adjournment. I am acting upon the application for adjournment in effect when I say I will send it back to Judge Ryan's part, because I am going to be out of this part at the end of November, and it appears that you might not be in a position to have your proof by the end of that month, so that Judge Ryan might then give you some day six months or nine months or whatever period he does then. I am making all these comments, and I should like to hear from you, Mr. Reilly. You have something to say about this.

Mr. Reilly: Well, Judge, thanks. I just want to say one thing to your Honor. In the light of what has been said, this suit was brought just about a

few days before the statute here would expire.

Now contrary to what has been said—and I am saying this without any feeling—our answer alerted Mr. O'Neill's office to the fact that we were raising this question, but I needn't point out to your Honor that no one has to alert that office to anything, and I think the fact that this litigation has not come up until this time is significant in itself. It has been pending some six years.

The Court: Let me see the card on that.

(Produced.)

Mr. Reilly: So as I say, Judge, this matter has been pending for some six years. During that time, and, as I say, because of the pleadings of the answer, which deny any agency on the part of the defendant here for this act, and likewise and more importantly there were pretrials held here, and there were pretrials held here before Judge Conger for a period of almost four months. There was no pretrial order.

I just want to say one thing in that connection. These pretrials were held when this question was not only mentioned, but to some extent explored.

Now the opinion that Judge Conger expressed was not dissimilar. As a matter of fact, it was identical with the opinion that your Honor has expressed, and it was that a law that applied—and Judge Conger, as matter of fact, made inquiry for any showing to the contrary. Your Honor asked whether or not an order was made. There was no order made because there wasn't any appearance on the part of the plaintiff's office at the last two pretrials. At that time the pleadings were discussed at some length.

The Court: Mr. Reilly, pardon me—was the problem before Judge Conger whether it was lex loci delicti that applied?

Mr. Reilly: Exactly.

The Court: Or who had the burden of proof?

Mr. Reilly: It was whether the lex loci delicti applied, and he expressed himself unequivocally—and I say that now—

The Court: How about the burden of proof? Was that gone into?

Mr. Reilly: Well, of course, the one that would have the burden of alleging and proving it, I take it, Judge,—I take it that the decisions are replete with statements that it is the one who is asserting the cause of action because, as Judge Holmes said in one of those cases, he said you could not complain if our courts refused to meddle with their affairs and remitted them to the place which established and would enforce their rights. So it operates both ways.

And at that time it was discussed, and Judge Conger, as I say, stated it as his observation, and unequivocally, that it was the lex loci that applied, and they would have to establish that there were any rights to the plaintiff onward.

At the last hearing he said, "You say otherwise. Let's see any law or any authority to that effect."

There was no appearance at the next two hearings, and so then the summer came on—the last one was in April—the summer came on and then nothing further was done about it, and the case went off the calendar. That went off the calendar until practically now.

Mr. Higgins: There was nothing done at the pretrial. At that time, Mr. Reilly, I think, submitted a memorandum in which he said he wanted to amend his pleadings to plead some Saudi Arabian law. We objected to it. There was some adjournment of the pretrial hearing and then they didn't have any more; they changed their policy here and there were no pretrial hearings. There was never any determination of it.

Mr. Reilly: Well now, Mr. Higgins, I don't want to get into anything on this, but when it was reaching a point where a decision or an order was to be entered, your office didn't show up, and it didn't show up at the March hearing and it didn't show up on April the 10th, both days.

The Court: Mr. Higgins, I know that you are not making any application for an adjournment other than in the best of faith. You don't want to drag this case out.

Mr. Higgins: No, sir.

The Court: You represent to the Court that you are not prepared for a ruling that the burden of proving the foreign law would be upon the plaintiff, and that therefore you ask for a reasonable adjournment in order to prepare yourself on the foreign law; is that correct?

Mr. Higgins: Yes. That is, we have this ruling here, and your Honor has stated that in the absence of any proof of a foreign law by the plaintiff that then the complaint would be dismissed.

The plaintiff is in a twofold position: We have to

look into the question—at the moment I say this to your Honor: We are not prepared to prove the foreign law, and before the case starts your Honor wants an answer as to whether we are going to or not.

Now that answer I cannot give at the moment. That is why I wanted the adjournment. I wanted to look into the whole problem.

The Court: Well then for the first subject you don't need too much time to look into the subject as to whether you are going to take whatever appellate review steps that you think you want to, to review the holding or the decision that the burden is upon the plaintiff to prove the foreign law?

Mr. Higgins: That is why I asked for the couple of weeks, originally, because if we went into the other problem it might be a longer one. I certainly do not want an adjournment. As far as I am concerned I say very frankly to your Honor that we were assigned here to start trial last Friday and my man is in Arkansas. He stated he is in the ice cream business down there. To be prepared to have re-physical examinations and everything, I had this man come up, and he actually came up last Tuesday, so that by the finish of today he will be in New York, away from his home, for a full week, and so that I was preparing, fully preparing the case to proceed to trial.

But as I say, both phases of the problem—I took the one phase, and certainly under the law as it existed we were not required to plead it, and secondly the other problem, if there was any pleading required or proof required, even if there were a ruling on that—which I still say does not apply to it—that burden would be on the defendant.

The Court: I think from this point on this is all repetitive.

Mr. Higgins: Yes.

The Court: Suppose we put this over until Wednesday morning and at that time you will report whether you want an adjournment for the purpose of proving foreign law, and then we will consider your application for an adjournment for that purpose.

If you don't want an adjournment for that purpose then the ruling will be made as has already been indicated on this question of law. Then you can bring it up for review.

Mr. Higgins: All right. Thank you, Judge.

New York, November 9, 1955;
12:30 o'clock P. M.

HEARING RESUMED

Mr. Higgins: Your Honor, on Monday, when this case was called for trial your Honor called both counsel into chambers and stated that from reviewing the pleadings you wondered whether there would be any questions raised in the case with reference to Saudi Arabian law, and Mr. Reilly at that time stated that he was raising the issue that the case should be tried on Saudi Arabian law and that it was our obligation to prove it.

The minutes will show that both parties argued the matter before you and that the Court then stated that in view of the pleadings and its knowledge that the

case was coming on on Monday it had spent the week-end reviewing the law and indicated in an oral opinion that it was the opinion of this Court and would be its ruling that the plaintiff would be required as part of its case to prove the Saudi Arabian law.

This was a decision contrary to the position taken by the plaintiff and we stated to your Honor that it raised a serious question, and you wondered whether we were prepared to go ahead and prove the Saudi Arabian law or whether we were going to rest on our position as it was, and you gave us an adjournment until this morning, and since Monday, and of course, even when this case was started, the plaintiff's attorneys gave considerable thought to and a lot of investigation and research was made as to whether or not it was essential or proper to allege the law of Saudi Arabia.

Our information then was, and our opinion then was and is now that there was and is now no law or legal system in Saudi Arabia. Our information then was and now is that there was and is none, and that there is merely a king who exists because of force majeure or what we more or less call a dictator, and that there are no courts or legal system in which the plaintiff could sue for this or any other claim like it, or any courts at all for that matter, nothing except what the king or some person whom he may designate or who represents him to examine into a special claim and can inform the king what he thought the complaining parties might be given.

He cannot even collect for doctors' bills, let alone his lost earnings, past, present or future; nothing for his injuries. The king might possibly say that what they call blood money should be awarded against a wrong to a driver, and they might order that the driver's hand

or arm be cut off or he be imprisoned or something like that.

Under these circumstances we recognized that there was no law or legal system or court, and no law which we could allege or prove, and that is the reason why we have made no pleading as to the alleged applicable law of Saudi Arabia, and since that research, and since Monday, our position is the same today and, of course, we didn't plead Saudi Arabian law and neither did the defendant. So we have taken the position that the case is one for a court and jury as a rudimentary tort between one citizen of the United States who invokes indisputable jurisdiction of the United States District Court of this District as against another citizen of the United States.

Under these circumstances we take the position that the plaintiff's evidence establishes the negligence of the defendant resulting in great permanent injury to him; that he should have the opportunity to have his case determined in this United States District Court, and judgment awarded in his favor.

But in view of your Honor's ruling we say frankly to you that because of our legal position here we do not intend today, and there is no use of asking you for any adjournment in the future for the purpose of proving any Saudi Arabian law in the plaintiff's case. We do and must rest on our position that in view of the facts and the situation from our legal standpoint that the case should be tried according to the rudimentary common law, and for that purpose I make this suggestion to your Honor, that we select a jury and that I put the plaintiff on the stand who will testify as to the essential facts with reference to the happening of the accident and the place and his injuries, and that at the

conclusion of the testimony by the plaintiff—and I understand also that there are hospital records here that were brought from Saudi Arabia and part of the official file, and I can mark them in evidence—and then state to the Court and on the record that except for the proof by the medical witness as to the nature, extent and permanency of the plaintiff's injuries, that the plaintiff rests, and that the defendant can then make his motions, and if your Honor then adheres to your original decision, the record would be complete.

Mr. Reilly: May it please the Court, this is the first acquaintance or intimation that I have had from the plaintiff that this was to be the nature of the application made this morning in open court. I didn't take it from what had transpired in your Honor's chambers last Monday and the opportunity that was then afforded to Mr. Higgins to make a decision that this was to be the nature of that decision.

Again I respectfully submit to your Honor in that connection that the incident that gives rise to this litigation occurred in 1947, in January of 1947; that suit was not instituted until over two years later, some two years and eight months or something when, if there were any statute of limitations applicable that were determinative of the right to bring the action here in New York, they would have expired.

In any event, since the inception of the suit the matter has pended before this Court. I do want to point out now as I did to your Honor in chambers that there was indication of the position of the defendant in this case, that indication being impressively created by the pleadings, which denied any agency on the part of the defendant in this case, though admitting that the

operator of the automobile or truck involved was an employee, but denying that there was any agency existing.

Thereafter in the course of the pendency of the litigation, pretrial hearings came on before Judge Conger of this court, which pretrial hearings extended over a period of about four months, when there were certainly at a minimum four or five such hearings.

The matter of the contentions of the respective parties was exposed and explored fully, and I say to your Honor at this time that it was the observation of that Judge at that time that it was his sense that it would be the lex loci or that of Saudi Arabia that would govern, and there were expressions on his part directed to the plaintiff, that he submit anything of which he was possessed that would indicate a contrary or opposed position.

Nothing was submitted by the plaintiff after these expressions on the part of that judge who conducted the pretrial, but as I stated to your Honor in chambers there was no final order entered because on the last two occasions of the pretrial the plaintiff didn't appear and there was then no resumption of those pretrial hearings.

I should note for your Honor's information and the record that those pretrial hearings were held in 1953 and that in the course of one of them there was an exchange of memoranda, so that the position of the defendant and the various contentions with respect to the applicability of Saudi Arabian law were well established.

There have been other motions in this court directed to the same situation as to the applicability of

that law.

I do want to say, too, that in connection with the hearing held before your Honor in the course of the discussions had in your Honor's chambers there was further exploration of the subject and there was considerable discussion of the decision of Mr. Justice Holmes in Cuba Railway Company vs. Crosby, reported at 222 U. S. 473, wherein it was stated that "With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it."

There were citations then of the American Banana Company vs. United Fruit Company at 213 U. S. 447, and there was the further observation and discussion of the statements of the Court in that case that "That and that alone is the foundation of their rights."

With respect to other discussions that were held in your Honor's chambers, it was pointed out in that decision that the Court stated, "As to the burden of establishing such law that we repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is a part of the plaintiff's case and if there is reason for doubt he must allege and prove it."

Now as to the other decisions, making reference to doubt or showing, I take it that I am within bounds in stating that your Honor has given some expressions that there can be no doubt about the absence of any common law or that Saudi Arabia is not a common law jurisdiction.

There was then further discussion, and it was pointed out at that time in the course of the discussions that in that decision Judge Holmes warned that "It is unwise to presume that our more liberal laws are everywhere the same. The fact that the laws of this nation provide rights of recovery to injured persons known elsewhere only reflects our attitude and is not to be extended to foreign torts without due proof."

I want to say, too, before leaving that, that there were further discussions in your Honor's chambers, in which there were references to the fact that the Court pointed out that particularly in derivative actions such as this in nature, where the relationship of the parties concerns that between employer and employee, those cases peculiarly demand reference to the jurisdiction where the incident occurred, and I take it it will be remembered that Judge Holmes made pointed observations in this respect in that case where, as your Honor pointed out, there was a direction by the employer to the employee to make use of a machine which was known to be or pointed out to be defective, and the hurt arising from that use by the employee, and the opinion of Judge Holmes stating that it was the law of that jurisdiction that obtained and had to be pleaded and proved.

The Court: Mr. Reilly, I believe that up until this time you are repeating in large part the substance of the discussion that had taken place in chambers Monday, and I believe there is a record of those discussions.

Now it probably wouldn't serve any useful purpose to continue repeating them here unless you are directing them again in support of an argument of your position. But I don't think that you need do that because I indicated clearly and unmistakably what my view was.

As I understand it, Mr. Higgins' suggestion this morning is really of a modus operandi, so that the Court's ruling may be properly reviewed as one from a final judgment, so that an appeal will lie, and that is the only purpose of Mr. Higgins' suggested method of procedure this morning; make a record, then he will have a final judgment from which he may appeal.

Do you have any objection to that?

Mr. Higgins: As a matter of fact, your Honor, I listened here to Mr. Reilly, and on Monday it was a question—you asked me whether I was going to ask for an adjournment for the purpose of proving Saudi Arabian law, in which event you said you would have to send it back to the calendar judge, and I merely am stating now that the legal position—and answering you frankly—that the plaintiff does not intend to prove Saudi Arabian law.

The Court: Is there any objection, Mr. Reilly, to the method of procedure outlined by Mr. Higgins this morning?

Mr. Reilly: I don't think so now if that be the purpose of this.

The Court: That is the only purpose.

Mr. Higgins: Since your Honor has stated on the record of the minutes and has already stated now what your ruling is going to be, Mr. Reilly has talked about delay, I am saying I am not asking for any adjournment; I am prepared to proceed, but since your Honor has already stated what the Court's ruling will be, I merely suggest some procedure so that we will have a proper technical record, and yet at the same time

suit the convenience of this Court and not go putting doctors on and a lot of testimony that would have no reference to the issue of law on which your Honor has and will rule.

Mr. Reilly: Well, I didn't understand it altogether in that nature because of some observations or statements made by Mr. Higgins with respect to the king in Saudi Arabia and his jurisdiction in the absence of law.

The Court: Mr. Reilly, I believe Mr. Higgins was really telling us that under the Saudi Arabian law this action would not lie.

Mr. Higgins: There is no law over there and no courts.

The Court: And that such an action as is brought here on behalf of this plaintiff would not lie if attempted to be brought in Saudi Arabia, and that is his statement, but it isn't necessary to go into that because he will argue whatever legal position he takes in the Court of Appeals.

Mr. Higgins: I think Mr. Reilly agrees with me on that, that there is no court that he can recover in in Saudi Arabia. I am merely saying that as an explanation of my position that I would not ask for an adjournment for the purpose of proving Saudi Arabian law.

The Court: It is entirely commendable, and this is a suggested procedure which lends itself as reasonable to the Court for making a record which will then bring the Court's ruling up for review.

Mr. Reilly: I see. All right.

The Court: Now in view of those circumstances, and because Mr. Higgins wants to make sure if the ruling is reversed and the matter sent back for a new trial he will not be deemed to have waived the jury, we can impanel a jury of one and then at the end of the plaintiff's case, when he rests, direct a verdict or dismiss the complaint.

So if you have no objection to the procedure, and knowing now what the purpose is, we will proceed with the trial.

Mr. Reilly: I have none.

The Court: We will impanel a jury, and with the consent of counsel the jury will be David E. Schwab II, who is my law clerk.

Mr. Higgins: And it is specifically stated on the record that this procedure is adopted and that the plaintiff is in no way waiving a jury in this case.

The Court: Waiving a jury of twelve.

Mr. Higgins: Twelve.

(David E. Schwab II was sworn as a juror.)

Mr. Higgins: Mr. Walton, would you take the stand, please.

LEO W. WALTON, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Higgins:

Q. Mr. Walton—

Mr. Reilly: May I address myself to his Honor a minute?

Mr. Higgins: Go right ahead.

Mr. Reilly: So that I may know, your Honor, and therefore not make any unnecessary objections to the Court, I take it that I cross-examine on whatever—

The Court: You may cross examine if you care to, but it hardly seems to be necessary in view of your recognition of what is going to take place.

Mr. Reilly: All right, sir.

The Court: Your failure to cross examine cannot be prejudicial because if it is ever sent back for a new trial, he is the plaintiff, and whatever he says is all self-serving.

There may be one difficulty, Mr. Reilly, that you might want to consider. That is this: that in the contingency, which I think is a very remote one, that it is sent back for a trial, and if at that time this plaintiff is dead, and your having had an opportunity to cross-examine, you may be bound by his testimony. That is a remote contingency.

Mr. Reilly: I will be guided accordingly, your Honor.

Q. What is your full name? A. Leo W. Walton.

Q. Where do you live now, Mr. Walton? A. 1005 North Highland, Harrison, Arkansas.

Q. And you are a citizen of Harrison, Arkansas? A. Yes.

Q. Where were you born? A. I was born at Walters, Oklahoma.

Q. And how long have you lived in Arkansas? A. Since 1931.

Q. What was the date of your birth? A. July the 27th, 1922.

Q. Prior to your injury in Saudi Arabia in 1947 by whom had you been employed? A. By TWA.

Q. Well, before your employment by TWA were you in the Army? A. Yes.

Q. As a what? A. As a lieutenant in the Air Corps.

Q. How long had you been in the Air Corps? A. Since 1943.

Q. During that time had you flown both light and heavy planes in the Air Corps? A. Yes.

Q. As a matter of fact, Mr. Walton, your flying for the Air Corps was in the Air Transport Command before your discharge which covered the Near East, Egypt, Saudi Arabia and that part of the world? A. Yes.

Q. As a matter of fact, were you the pilot that flew the Wickersham—

Mr. Reilly: This is objected to.
The Court: Sustained.

Q. Then were you discharged; did you receive your Army discharge here in this country, or did you receive it in the Near East without returning to this country?

A. I received it in the Middle East, Near East.

Q. Where were you discharged, A. In Abadan, Iran.

Q. And when you were discharged did you then get a job with some company? A. Yes, with TWA.

Q. As a what? A. As a senior flight supervisor of Abadan Air Base.

Q. Where is Abadan? A. In Iran.

Q. What is the full name of TWA? A. Trans World Airlines.

Q. Then some time in the course of your employment were your duties shifted from that place to Dhahran? A. Yes.

Q. When did that occur? A. In April I believe.

Q. Of 1947? A. '46.

Q. And what was the purpose of your assignment from the job as night supervisor down to Dhahran? A. It was to fly Aramco's airplanes.

The Court: Excuse me, what?

The Witness: Aramco, Arabian American Oil Company.

Q. Aramco is a short name for Arabian American Oil Company, but who paid your salary? A. TWA.

Q. Was there an airport near Dhahran? A. Yes.

Q. What was the name of the airport? A. Dhahran Airport.

Q. As a matter of fact this Dhahran, was that a community solely built and maintained by the Aramco? A. The City of Dhahran, yes.

Q. Getting down to the day on which this occurred—

Mr. Higgins: Withdrawn.

Q. How much a month were you paid as a pilot for TWA? A. A thousand dollars a month.

Q. In addition to that thousand dollars a month did you get quarters? A. We had quarters and allowance away from our home base.

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Q. That is the place where you lived; you didn't have to pay for that? A. No, we didn't pay for our quarters.

Q. This flying that you did, flying those planes for Aramco, where did you fly to? A. There were several places, just anywhere that—Aramco set up the flights through TWA, and where ever they said fly that is where we flew.

Q. At this Dhahran Airport was there a TWA flight supervisor? A. Yes.

Q. Who was he? A. Mr. Frank Pope at that time.

Q. On the morning of January 5, 1947 were you intending to go out to the Airport from Dhahran? A. Yes, I had a flight that morning.

Q. Did you live in Dhahran? A. Yes.

Q. Where was your flight scheduled for? A. For Ras Tanura.

Q. That is another place in Saudi Arabia? A. Yes.

Q. How did you go from where you lived at Dhahran to the airport? A. Mr. Cooper, whom I was flying, would leave his car with me on the evening flight.

Q. Whom you were—what, I didn't get you.

• • • •

A. Mr. Cooper and Mr. Stapleton at that time were flying from Dhahran to Ras Tanura morning and night.

Q. As passengers? A. Yes, and Mr. Cooper would leave his car with me to drive back to the Dhahran area, and then back to the air base the next morning, and then he would take it back to the Dhahran area.

Q. And on this morning were you using that car to drive out to the airport? A. Yes, I intended to.

Q. When you left Dhahran was anybody with you? A. Yes.

Q. Who was that? A. Mr. Palmer Lee.

Q. He was killed in this accident? A. Yes.

Q. What kind of a vehicle was it? A. It was in a Ford pick-up truck.

Q. Ford pick-up truck? A. Yes.

Q. That is with the open back, with the seats in front for the driver and anybody who would sit next to him? A. Yes.

Q. American model truck with a lefthand drive? A. Yes.

Q. About what time was it that you left, not generally, to your best knowledge, that you left Dhahran? A. About 6:15.

Q. A. M.? A. Yes.

Q. Was it daylight or dark? A. It was daylight.

Q. What road did you take from Dhahran to the airport? A. That road is known as the Al Kobar Road.

Q. By that it went from Dhahran to Al Kobar? A. Yes, and about six miles down this road you turn to the right to the air base.

Q. That is, you turn off the road to the air base? A. Yes, you turn off of the Al Kobar Road to go to the air base.

Q. And what direction were you driving in when

you left Dhahran to drive out to the airport? A. East.

Q. What kind of a road was it? A. It was a black top and oil road.

Q. And was it right through the desert? A. Yes.

Q. Sand on either side? A. Yes.

Q. When you say "black top," is that a tar road? A. It was kind of a tar in the center and then on the sides they had it oiled down.

Q. All right. Now the tarred portion of the road, how wide was that? A. About 25 feet.

Q. And the oiled portions out on the side, how wide were each one of those strips on either side of the tarred portion? A. About 10 feet; total width of the road was about 40, 45 feet.

Q. As you drove out there from Dhahran, what kind of a morning was it? A. It was a foggy morning.

Q. As you were driving along how far had you gotten from Dhahran, how far had you driven east before something happened? A. About five miles.

Q. How many miles was the airport? A. About eight to ten.

Q. What part of the road were you driving on? A. I was on the righthand side.

Q. As you went from Dhahran to this point about five miles out were there other vehicles going your direction and other vehicles going the opposite way? A. I had passed several vehicles in the Dhahran area and on this road.

* * * *

Q. Was there any line or marking indicating the center of this road? A. There was none marking the center, no.

Q. Taking an imaginary line down the center, where

was the lefthand side of your car with reference to the center of the highway? A. Two or three feet to the right.

Q. Which way? A. To the right of it.

Q. How far did you have clear or good visibility ahead of you? A. 30 feet.

Q. How fast were you driving? A. 10 to 15 miles an hour.

Q. As you were driving along there 10 or 15 miles an hour what happened? A. Well, the first thing I saw was one headlight on a truck or car coming toward me. Then the first thing before I knew it he was on me and we hit head-on, and he was on my side of the road.

Q. Well, this truck you are talking about, which way was the truck going? A. He was going west.

• • • •

Q. Where was the other truck with reference to this imaginary center line of the roadway? A. He was dead ahead of me.

Q. He was dead ahead of you. Was any part of his vehicle on the north side of the center line or in the westbound part of that road? A. No.

Q. Now you say you saw one headlight? A. Yes.

Q. Which headlight would that have been as you were looking at it? Would it have been the lefthand one or the righthand one? A. His lefthand light.

Q. Was on or out? A. It was on.

Q. What about the righthand one? A. It was out.

Q. What happened then; did you crash? A. We just crashed head-on.

Q. Then what happened to you at that time? A. I was knocked unconscious.

Q. Did you come to at any time out on the roadway? A. No.

Q. When was the first time that you came to? A. I came to in the Dhahran Hospital and I don't know how long I had been there.

Q. Do you know when it was, what day, or what time it was when you first remember anything? A. No.

Q. When you came to how did you feel? A. Well, I came to, I had a—my right arm was swollen, and my chin and all was taped up; I was sore; and my left leg was in a cast.

Q. While you were there in that hospital were you operated on? A. Yes.

Q. When were you operated on? A. When? That day that I was admitted.

Q. After you were operated on was a cast put on your leg? A. Yes.

Q. During that time did you have any pain? A. Yes, I had a lot.

Q. Where and in what parts of your body? A. My leg and chin and my arm, right arm.

* * * *

Q. Outside of the pain in the chin did you notice anything else at that time? A. Yes, I had headaches after, at that time, and ringing in the ears.

Q. How long were you in the Dhahran Hospital? A. About 30 days.

Q. Were you transferred from there to another hospital? A. Yes.

Q. Where? A. To Ras Tanura.

Q. How long were you in Ras Tanura? A. About ten days, I believe.

Q. What did they do for you in Ras Tanura? A. Heat treatments and swirl baths on my leg and massages.

Q. When did they take the cast off your leg? A. I believe it was after, in the Dhahran Hospital, just after I was transferred.

Q. After or before? A. Just before—it was taken off at the Ras Tanura Hospital, I believe.

Q. How did your leg feel after the cast was taken off? A. It was stiff.

Q. Did you have any pain in it? A. Yes.

Q. What kind of pain? A. Well, all up and down the leg. When I would tend to move it, it would ache. It would ache and hurt at that time.

Q. And after you got out of the hospital just tell us how you felt.

The Court: Off the record.

(Discussion off the record.)

Mr. Higgins: At your Honor's suggestion, since the medical phase of the case will not be developed, I will adopt your Honor's suggestion and not go into detail on the pain and suffering and general disability of the plaintiff, so long as it is understood that I am not just not bringing it out now, not because it does not exist, but it is just because we don't want to encumber the record.

The Court: Needlessly at this time.

Mr. Higgins: That's right.

Q. Now, how long did you stay in Saudi Arabia? A. I stayed until July the 31st, I believe. That is when I left.

Q. Were you paid up till that time? A. Yes.

• • • •

Q. How long did your payments continue with that job? A. It continued through my terminal leave that I had coming until I got home.

Q. Now just with reference to this one phase of it, while you were still there in Saudi Arabia did you go up on flights? A. Yes.

• • • •

Q. As a pilot or as a co-pilot? A. As pilot and co-pilot.

Q. And what did you notice as to yourself and what happened to you and what your condition was when you were piloting or landing a plane and how you felt afterwards? A. Well, in piloting I had considerable trouble because my leg was still stiff, and after flying I had trouble hearing, and particularly also in landing and takeoffs I couldn't control the ship because I couldn't get sufficient rudder movement on my left leg.

• • • •

Q. After you came back to this country, when did you first go to work again? A. I went to work for myself in November of 1947.

Q. In the ice cream business? A. Yes.

Q. And have you been in that ice cream business since? A. Yes.

Q. And that ice cream business is a corporation? A. Yes.

Q. What is the name of it now? A. Golden Rich Ice Cream Company.

Q. Is that in Harrison, Arkansas? A. Yes.

Q. As a matter of fact, you had another name for

it when you first opened it up. A. Yes, Arkies Ice Cream Company.

Q. It was always a corporation? A. Yes.

Q. Now, how much a year have you earned from that corporation since that time until now?

Mr. Reilly: This is objected to.

The Court: He wants to show loss of earnings.

Mr. Reilly: I submit it might be dependent upon any one of a dozen or two things, if your Honor pleases.

Mr. Higgins: We are not going to prove the medical. In our medical I intend to prove that he cannot fly any more, and therefore he is in this business. I just want to technically prove his loss of earnings.

Off the record, do you have those figures on your earnings from the corporation?

The Witness: Yes.

Mr. Reilly: This is objected to, if your Honor please.

The Court: On what ground?

Mr. Reilly: Because, if your Honor pleases, there might be, as I said before, a dozen or two things that would enter into the earnings.

The Court: Couldn't you develop that on cross-examination? Can't he testify as to what his earnings were, earnings being what the payments were that were directly made to him? You might be able to develop this was a one-man corporation. As a matter of fact, the corporation made a great deal of money and it wasn't distributed, but he can testify—it is competent for

him to testify what his earnings were, and through your cross-examination you may develop that his earnings may have been a great deal higher.

What is the difference whether he worked for a corporation he controlled or any other corporation? Those were his earnings.

When you say "earnings", maybe if we change the word "earnings" Mr. Reilly will be happier.

What salary payments were made to you by this corporation?

Mr. Higgins: Could you answer it that way?

The Witness: Yes. You want it by years since I have been employed I mean since I opened the business?

Mr. Higgins: Yes.

A. In '48 I drew none. In '49 I drew $1755.33. In 1950, $2,249.46. In '51, $4.742.75. In 1952, $5,000. 1953, $5,000.

Mr. Reilly: What's that?

The Court: 5,000.

The Witness: 5,000.

Mr. Reilly: Five?

The Court: That's right.

The Witness: Yes, sir.

A. (Continuing) In '54, $5,009.62.

As a matter of fact, since the question came up, Mr. Walton, do you have the records showing what the corporation made in those years? A. Yes, I do.

* * * *

Q. Now, Mr. Walton, since that time, since you have been back to this country, tell us how you felt with reference to your head and your general condition. A. Well, I had a stiff leg and continuous ringing in my head, and I had headaches, and I have had three blackouts in the last—since 1951.

• • • •

A. I have been to several doctors with my hearing, and also with shoulder trouble.

The Court: Mr. Higgins, aren't you now going again into the question of medical proof?

Mr. Higgins: Yes. I just want to ask one more question.

Q. With reference to your hearing, what do you notice about your hearing? A. It is just continuous ringing all the time in my head and at times I can't hear to speak of at all.

Q. All right now, did you ever have anything the matter with the leg before this automobile crash? A. No.

Q. Did you ever have anything the matter with your hearings before this? A. None noticeable except after high altitude flights or something like that.

Q. Did you ever have any of these blackouts before? A. No.

• • • •

Q. Mr. Walton, at the time you terminated your employment with TWA were you able to fly planes and act as a pilot?

Mr. Reilly: This is objected to.

The Court: Overruled—overruled.

A. I was only okayed for light duty on around coast ships was all, light ships, sir.

Mr, Higgins: Off the record.

(Discussion off the record.)

Mr. Reilly: Then with the statement, if your Honor please, that it is stipulated and agreed by counsel, to wit, that the plaintiff consents that the defendant in no way waives any rights by a failure to cross examine as suggested by your Honor, nor does the defendant sustain any prejudice under any circumstances whatsoever by a failure to cross examine with respect to the testimony given, it being given solely for the purposes that your Honor has indicated, to make a prima facie case on this record—

The Court: And for the purpose of this record alone.

Mr. Reilly: That's it, sir.

Mr. Higgins: I believe that is satisfactory, your Honor. I wonder, your Honor, we have the file, should we just mark in evidence the hospital records from over there?

The Court: Well, the hospital records from Dhahran will be deemed to be marked in evidence, again reserving to Mr. Reilly all objections, if any, that he may have thereto.

Mr. Higgins: Your Honor, subject to the further proof on the nature, extent, seriousness and permanency of the plaintiff's injuries, subject to the testimony by medical witnesses and subject to the other proof of loss of earnings and evidence

generally with reference to damages, the plaintiff rests.

Mr. Reilly: Then, if your Honor pleases, ever with respect and in behalf of the defendant I move for a dismissal of the complaint on the ground that the plaintiff has wholly failed to establish any cause of action against the defendant in this case; that there is no proof whatsoever before this Court of any negligence—

The Court: Off the record.

(Discussion off the record.)

Mr. Reilly: If your Honor states that the defendant again sustain no prejudice by failing to make any more formal motion than that at this time—

The Court: Put it on the record.

Mr. Reilly: I think I should move, unless your Honor holds otherwise, that any damages that have been established here have not been identified with any issues for which my client can be held responsible, and then specifically, in accordance with the Court's suggestion, do I move for a dismissal of the complaint on the ground that the plaintiff has not proved the lex loci, that it is the law of the place where this accident occurred that governs, and has not established any cause of action, and for that reason, and accordingly it is with respect that we move for a dismissal in accordance with the further grounds advanced to your Honor in the course of our discussions in chambers.

Mr. Higgins: And, of course, very briefly, your Honor, on all the grounds stated in chambers

and here this morning, which I merely summarize in a few words, the plaintiff opposes the motion on the grounds that the pleadings set up a common law case, that this is a rudimentary tort, and that the law of the place here applies, and that there is no law or no courts in Saudi Arabia under which this man could recover, and it is an action between two citizens of the United States, and plaintiff submits that the motion should be denied.

Mr. Reilly: Of course in accordance with the memorandum submitted to your Honor—and there is always a statement that has a peculiar ring, that there are no courts in Saudi Arabia or that there is no system of law, of course the defendant takes vigorous exception to any such statement.

The Court: Well, there is no proof on the subject. The record establishes that the lex loci delicti was Saudi Arabia; the record is completely barren as to the law of Saudi Arabia.

The Court will not take judicial notice of the law of Saudi Arabia.

In view of the absence of proof, that under the law of Saudi Arabia at the time the incident testified to occurred would give rise to a cause of action in favor of the plaintiff, the defendant's motion to dismiss is granted.

Mr. Higgins: And that of course, your Honor, is with an exception to the plaintiff.

The Court: With an exception, that's right.

Judgment Appealed From

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

Jury Trial—Judgment for Defendant by Directing Verdict

Civil Action No. 50-170

[SAME TITLE]

The issues in the above-entitled action having been brought on regularly for trial before the Hon. Alexander Bicks and a jury on November 9, 1955, and the Court having directed a verdict in favor of the defendant, it is

ADJUDGED: That the defendant have judgment against the plaintiff.

Dated: New York, November 15, 1955.

WILLIAM V. CONNELL,
Clerk.

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 50—170

LEO WALTON,
Plaintiff,

—*against*—

ARABIAN AMERICAN OIL COMPANY,
Defendant.

Sirs:

NOTICE IS HEREBY GIVEN that Leo Walton, the plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit, from each and every part of the final judgment entered in this action on November 15, 1955, and from the decision and order granting the defendant's motion to dismiss plaintiff's complaint.

Dated: New York, N. Y., November 25, 1955.

Yours, &c.,

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To:

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FILED
SEP 7 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 308

LEO WALTON,

Petitioner,

against

ARABIAN AMERICAN OIL COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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LEO WALTON,

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ARABIAN AMERICAN OIL COMPANY,

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

Few principles of the law of torts are better settled than that the *lex loci* creates the right to recover and establishes the measure of damages in negligence actions.

The petition for certiorari virtually seeks the abandonment of this principle.

To justify abrogation of this well established burden of pleading and proving the foreign law, petitioner's counsel in the District Court and the Court of Appeals offered only the bare statement that the Arab Kingdom of Saudi Arabia has no law.

This shocking statement—unsupported by even an attempt at proof and untrue in fact—buttressed only by constant reiteration is the premises upon which the petitioner seeks certiorari.

This same contention was advanced repeatedly during the seven years the case was awaiting trial. Despite abundant opportunity—and even in the face of the pointed observations of the District Court pre-trial judge and trial judge, the petitioner has insisted that his common law complaint and proof was a complete discharge of his plaintiff's burden (R. 15, 17, 23).

The trial judge quite properly refusing to ignore the fact that the accident occurred in Saudi Arabia, dismissed the complaint at the end of the plaintiff's case since it was apparent that the common law did not apply and Saudi Arabian law had not been shown.

Petitioner supposedly presents four questions for review. Questions II and III are merely repetitive of I and suffer from the same fatal defect. All three assume that the petitioner's statement that Saudi Arabia has no civilized law is by mere assertion a fact which is binding upon the District Court—which Court thereafter rather than proceed in a vacuum must apply the only law available to it, i. e., the common law of the forum.

Question IV asks for certiorari on the basis that there was a dissent in the Circuit Court of Appeals. Actually the dissenting judge was in complete harmony with the rest of the Court in that the complaint was properly dismissed since the *lex loci* was neither pleaded nor proven. His dissent was simply on the grounds that the plaintiff be given still another chance to plead and prove Saudi Arabian law. However, as was pointed out in the opinion, petitioner's counselor over the years had ample opportunity to consider the matter and unequivocally refused to present any case except one based on the common law of the State of New York (Appendix to Petition, p. 33).

None of the questions meet the precedent qualifications of reviewable issues.

On the record and petition presently before the Court there is presented no issue of law and no issue of fact—though petitioner's counsel assumes that his statement that there is no Saudi Arabian law is a proven fact which calls for the suspension of the usual rule of *lex loci.*

The litigation was disposed of in the lower courts by the application of long established conflict of laws rules of the Federal and New York Courts—which in this case were identical.

Plaintiff's difficulty arose because of his refusal to proceed by them—the consequences of which conduct was brought home to him years before the trial.

For some seven years prior to the trial, the petitioner labored sedulously to create the impasse in which he now finds himself. This can best be appreciated by reviewing the history of the litigation.

The action was commenced by the service of a summons and complaint on May 10, 1949. This was some two years and four months after the accident which occurred on January 5, 1947.

The complaint framed solely on common law negligence grounds alleged that the plaintiff Walton was injured as a result of a collision which occurred on the Dhahran-Al Khobar Road in Saudi Arabia. It was further alleged that the accident occurred because of the negligent operation of a motor vehicle owned, operated and controlled by the defendant corporation which was being operated on the business of the defendant by its agents, servants and employees.

The answer admitted ownership and operation on the business of the defendant by one of its employees. Control was denied.

Somewhat misleadingly an attempt was made to portray Walton as a transient in Saudi-Arabia. None of this is justified by the record which indicates that antedating the accident from at least April of 1946 until July 31st, 1947, he was a resident of Saudi Arabia employed by Trans-World Airlines (R. 33, 39).

During all this time he was flying the defendant's aircraft. At the time of the accident he was driving one of Aramco's trucks.

Despite the extravagant characterizations of the negligent fashion in which the truck of the defendant was operated, the fault for the accident is very much in dispute.

Walton was the only witness at the trial. His testimony was without cross-examination by the defendant since the trial court considered it unnecessary in a case headed for appellate review (R. 31).

From his testimony it is alleged that the accident was between two trucks traveling in a dense fog in opposite directions on an ill-defined desert road without a center line (R. 36, 37). Visibility was only 30 feet (R. 37). Despite these dangerous conditions Walton continued to drive. It is not claimed that he took any precautions and in view of these driving conditions a very serious question as to his contributory negligence is raised.

Some six weeks after the accident Walton resumed his flying duties in Saudi Arabia and continued them until July 31, 1947 (R. 39, 40). He then went on terminal leave and returned to this country. In November 1947 he entered the ice cream business for himself.

Despite some plea in the petition based on the world wide activities of American corporations and citizens, Walton was not in Saudi Arabia at the instigation or invitation of Aramco. It was his voluntary act which led him

to residence and employment in that nation without the knowledge of much less inducement by the defendant corporation.

ARGUMENT

I

No question appropriate for review by the Supreme Court is presented in the Petition for Writ of Certiorari.

Section 1254 of Title 28 of the United States Code is probably adequate authority to satisfy the technical requirements of the jurisdiction of the Supreme Court in this case. However, even a cursory glance at the elements necessary for the Supreme Court to review the decision of a Court of Appeals, indicates that those special and important reasons outlined in rule 19 of the Rules of the Supreme Court are completely lacking.

Basically, the petition for writ of certiorari asks this Court to review the application by the lower Federal courts of long established and undisputed principles of law to a particular fact and pleading situation.

The petitioner challenges no decision of any Court of Appeals. He asks for no reversal of any pertinent decisions. He cites decisions purportedly in support of his arguments which were known to the District Court and which were also presented to the Court of Appeals.

The decision did not dispute the cases cited but denied their applicability to the facts in the record, and further in disposing of every contention raised by petitioner, the Court cited an exhaustive list of appropriate State and Federal decisions on every question raised.

Since it is axiomatic that certiorari to review a judgment, however important it may be to the petitioner, will not be granted when the petition does not involve a question of gravity and general importance, and there is no conflict between the decisions of State and Federal courts or between those of Federal Courts of different circuits, the petitioner does not present valid questions for review.

In essence, the District Court dismissed the complaint since in the face of the plaintiff's complaint and proof at the trial, it was apparent that the tort for which relief was sought was committed in Saudi Arabia, and that necessarily the conflict of laws rule in the State of New York,—which in this case was the same as the conflict of laws rule in the Federal courts—requires that the case be tried with reference to Saudi Arabian law, and not as was insisted by the petitioner, under the common law rules of the State of New York.

While petitioner may disagree with the lower court's application of the long established rule that the *lex loci* prevails (in the absence of any proof that there is no *lex loci*), this was a decision which involved the lower Federal courts applying local law—a decision which is not ordinarily reviewable except on a plain showing of error. *Palmer* v. *Hoffman,* 318 U. S. 109, rehearing denied 318 U. S. 800.

In view of the fact that both the trial court and the circuit court were necessarily constrained by the record before them, they could not accept as a substitute for proof the plaintiff's bare statement that there was no Saudi Arabian law. Obviously there was and could be no attempt at proof since the bare statement is contrary to the fact. The failure to even make an attempt at proof, despite ample opportunity and warning, creates the suspicion that the petitioner's counsel found it to be an impossibility and hence any efforts in that direction would tend to support the defendant's contentions.

The four questions presented by the plaintiff fail to meet the "special and important" reasons required for Supreme Court review on a writ of certiorari.

Question 1 embraces within it the premises "when that foreign country has no recognized civilized legal system". The trial court and the Circuit Court of Appeals rejected that statement as unproved and so foreign to the fact as to prompt the court to note "We are loath to and will not believe it. . . ." (Appendix to Petition, p. 32).

Hence, the decision to dismiss and the affirming of that decision by the Circuit Court was wholly justified by the record before them, since the alternative was to take the incredulous statement of counsel and raise it to the dignity of a finding of fact.

This refusal was inevitable in view of the common knowledge that Saudi Arabia, an ancient and honorable nation and a member of the United Nations, is possessed of a government as stable as most of the nations of the world.

With misplaced scorn, petitioner would hold up to ridicule and obloquy a civilization and culture, which gave us so much in mathematics, astronomy and architecture that we still employ many of their terms and forms in those sciences. That the Arab system of jurisprudence finds much of its origin, development and enrichment from the Koran and the religious teachings of Mohammed as embodied in their traditional law—does not necessarily make it less worthy than our own system, particularly in the eyes of millions inhabiting that country where the plaintiff voluntarily went to seek his livelihood.

Saudi Arabia possesses a civilization and a way of life which while not as rich as ours, has proved adequate for its citizens. The accomplishments of the scholars and the universities of the Arabian world are not to be lightly tossed aside by the gratuitous insult of counsel, who did not even

feel compelled to justify his statements with a single reference to any proof whatsoever.

The Circuit Court rejected the statement and since it was not an inadvertent error but rather a long, continued and deliberate course of conduct, voluntarily chosen by the plaintiff's attorney and maintained in view of admonitions and entreaty by the District Court, they affirmed the dismissal for the failure to allege and prove the Saudi Arabian law or its non-existence.

Question 2 by reference incorporates question 1. It is actually a corollary of question 1, and it contains the same fatal defects. It asks, when foreign law is not pleaded by the plaintiff or the defendant in a tort case, does not the common law apply, even though the tort occurred in a non-common law jurisdiction? This begs the question that the rule of *lex loci* imposes upon the plaintiff the burden of pleading and proving the law of the jurisdiction which creates the cause of action. Putting it another way, petitioner asks simply, that may not a plaintiff avoid all questions of *lex loci* by simply refraining from pleading or proving it. In short, there is no rule of *lex loci*. Without laboring the point, the question has been answered a thousand times, to the effect that the common law does not apply to foreign torts, particularly when they did not occur in nations inheriting the common law.

Question 3 continues the error when it poses the proposition that the Court of Appeals was in error when it ruled that New York substantive law held that under the facts in this case the *lex loci* applied herein. Again the assumption is indulged that there is no Saudi Arabian law. Moreover, the Court of Appeals in its opinion cited several New York cases to the effect that the *lex loci* applies in foreign tort cases and determines not only the right to recover but the measure of damages.

Question 4 misstates the position of Judge Frank since nothing in the opinion indicates that he disagrees with the applicable rules of law, particularly with those in reference to the *lex loci*. His comment that it seems unjust to impress upon the petitioner the burden of showing Saudi Arabian law was not necessary to the decision since he himself pointed out that the Court was bound by the conflicts rule of New York.

Moreover, even accepting it at its face value Judge Frank's statement really sets forth a rule of convenience which is hardly in harmony with the usual assumption that all parties are equal before the bar. True it is that it might be more convenient for the Arabian American Oil Company to establish just what Saudi Arabian law might be, but that begs the question that it is not the defendant's burden to do so. No need to labor the point how dangerous a rule of law might be that makes expediency or convenience determinative of upon whom rests the burden of proof.

Judge Frank's suggestion that the case be remanded to give the plaintiff another chance to conduct his case in accordance with long established rules or to prove that those rules should not be applied in this case is but an indication of his generosity with which his colleagues were not in accord, since the plaintiff's counsel had spurned numerous opportunities to do just that in the past.

Even Judge Frank, however, indicated that to do as he suggested would be an abuse of the trial court's discretion under the prevailing New York doctrines. Hence, when question 4 raised his dissent and suggestion to remand as a basis for review by certiorari, it raised grounds which are not tenable and which do not meet the qualifications of questions to be reviewed by writ of certiorari.

II

Petitioner's statement that there is no applicable law of Saudi Arabia, is unsupported by any proof and is contrary to the fact.

Among the many false premises from whence spring all petitioner's arguments, none is more glaring in error than his unsupported statement that Saudi Arabia is uncivilized and has no law.

With one stroke, a dozen Arab nations, including Egypt, Iran, Iraq, Lebanon and the other nations of the Near, and Middle East, as well as those of Northern Africa, are reduced to a state of anarchy.

These nations are members of the United Nations and Saudi Arabia included have exchanged diplomatic representatives with the United States.

Plaintiff has had access to Saudi Arabia and using the machinery of the Federal Rules of Civil Practice he obtained Walton's certified hospital records which he introduced into evidence (R. 44).

To obtain it he used the facilities of the U. S. Consul in Saudi Arabia.

This same source could have procured for him a copy of Saudi Arabia's Motor Vehicle Regulations, issued by the Director of Public Security of the Kingdom of Saudi Arabia. Such code, which is entitled "REVISED AUTOMOBILE REGULATIONS", was approved by Royal Decree No. 13125 dated November 19, 1942, and is available from the government printing press at Mecca upon payment of a small charge.

Reading it is enlightening, since it compares favorably with any vehicle code of the 48 states.

It provides, among other things, that all drivers must be tested and then licensed. The license must bear the

driver's photograph. Far in advance of contemporary state laws it makes mandatory yearly physical examinations and makes compulsory carrying the code at all times while operating a vehicle. (Articles 2, 3, 4, 5, 6, 7, 14, Revised Automobile Regulations.)

There is a full set of rules of the road with appropriate fines and prison terms for violations (Articles 24 to 51 and 56 to 84).

In view of this code, petitioner's claim in his brief that the only penalty for wrongful operation might be the cutting off of the driver's hand or arm is an outrageously false statement (Petition, p. 9).

This attempt to substitute sensationalism for fact was not lost on either the Trial Court or the Court of Appeals.

Not one iota of proof has been offered to substantiate these claims and during the seven years of litigation, numerous opportunities were available.

The conclusion is inescapable that the plaintiff, despite his knowledge that one day he would be called upon to prove his contentions, sought to evade this responsibility by a show of boldness and a mere statement of denial of the existence of any law.

Petitioner's counsel was hardly fair to the Trial Court when he demanded without proof that the Court presume that Saudi Arabia was an uncivilized nation. Judge Frank pointed out that in the face of such a blank record, there was only one course the courts could take:

> "But plaintiff has offered no data showing that Saudi Arabia is thus uncivilized. We are loathe to and will not believe it, absent such a showing." (Appendix to Petition, p. 32.)

III

The New York Conflict of Laws rule applicable to the alleged tort is to the effect that the law of Saudi Arabia is the substantive law to be applied and it must be pleaded and proven by the plaintiff.

Judge Frank in his opinion in the instant case pointed out that under the requirements of *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, 313 U. S. 487, the District Court in diversity cases must apply the substantive conflict of laws rule of New York.

The federal rule coincides with that of the State of New York—and incidentally is uniform in all the 48 States. Hundreds of New York cases can be cited in support thereof.

A few will suffice. *Schwertfeger* v. *Scandinavian American Line*, 186 App. Div. 87, 174 N. Y. S. 147, Aff'd 226 N. Y. 696, 123 N. E. 888; *Loucks* v. *Standard Oil Company*, 224 N. Y. 99, 120 N. E. 198; *Riley* v. *Pierce Oil Corporation*, 245 N. Y. 152, 156 N. E. 647; *M. Salimoff & Co.* v. *Standard Oil*, 262 N. Y. 220, 186 N. E. 679; *Metcalf* v. *Reynolds*, 267 N. Y. 52, 195 N. E. 681; *Voshefsky* v. *Hillside Coal And Iron*, 21 App. Div. 168, 47 N. Y. S. 386; *Ritchie* v. *Crudelle*, 255 App. Div. 886, 7 N. Y. S. 2d 909; Restatement of Conflict of Laws, Chap. 377.

Judge Frank, in his opinion, indicated that the Court of Appeals even went behind the New York rule in an effort to determine whether it was in any way obsolescent. His conclusion was to the effect that the New York rule, as well as the Federal rule, was still to the effect that the *lex loci* in tort cases controls both the right to recover and the measure of damages. It is a question of fact which must be pleaded and proven by the plaintiff.

Here we cannot but observe that the petitioner, again with something less than candor, quoting on pages 11 and 12 of the Petition, portions of the reasoning of Judge Frank—in balancing the pros and cons of the subject—most significantly omits the learned Judge's reasoned conclusion "But we see no signs that the New York decisions pertinent here are obsolescent."

Plaintiff relies in large degree in his petition for writ of certiorari on the fact that Judge Frank dissented from the decision to affirm the dismissal. However, reading his opinion, shows that he was in complete accord with his colleagues as to the applicable legal principles as well as the facts. His dissent in no wise suggested that there was any merit in the petitioner's contentions, but rather after substantially pointing out the error of these contentions, he was merely of the opinion that on the basis of mechanical practice, the case should be remanded to give still another opportunity to the petitioner to prove the law of Saudi Arabia (or its absence).

However, even Judge Frank did not overlook the fact that the litigation had been going on since May 10, 1949. From his inspection of the docket, he pointed out that pretrial hearings were held before Judge Conger at the District Court on at least four different occasions (Appendix to Petition, p. 33).

From at least 1952 up until the time of trial, almost the sole discussion involving this case was the application of Saudi Arabian law.

The pretrials were conducted in accordance with the formal requirements of District Court pretrial rules.

As provided by the rules, memoranda were exchanged between counsel in which the subject of pleading and proving Saudi Arabian law was raised again. Despite the importunities of Judge Conger back in 1953 indicating

that it was his view that the plaintiff should be prepared to plead and prove Saudi Arabian law, no action was taken to do so. The trial judge himself, when it first came on for trial on November 7, 1955, once again solicited the plaintiff's position on this question. Judge Bicks even offered to adjourn the trial so that the petitioner might amend any deficiencies in this respect (R. 16-18).

Nevertheless with arrogant presistence that his erroneous statement that there was no law in Saudi Arabia, must be accepted, and that hence the case should be tried on New York State common law principles, plaintiff's counsel unequivocally took the position that he would not prove the foreign law and wanted no adjournment (R. 23).

In his opinion, Judge Frank stated "Since the plaintiff deliberately refrained from establishing an essential element in this case, the complaint was properly dismissed" (Appendix to Petition, p. 33). From this and the rest of his point-by-point discussion of the elements of the appeal, which clearly indicate that he gave the utmost consideration to every contention of the petitioner, it was apparent that Judge Frank is in complete accord with his colleagues in that the dismissal was proper.

Only because of Section 344a of the New York Civil Practice Act does he recommend remanding, not as an approval of the plaintiff's departure from his burden of proving the *lex loci*, but rather to give him another chance to do so.

Section 344a of the New York Civil Practice Act simply provided that "Except as otherwise expressly required by law, any trial or Appellate Court, in its discretion, may take judicial notice of the following matters of law:".

To be sure, under Rule 43(a) of the Federal Rules of Civil Practice, since a Federal Court must receive evidence if it is admissible according to the Rules of Evidence

of the State in which the court sits, Judge Bicks could have in his discretion taken judicial notice of the law of Saudi Arabia. However, there are two reasons why in the instant case it would have been an abuse of his discretion to have done so. Judge Frank recognizes both of them.

To begin with, plaintiff's counsel forestalled any exercise of such discretion on the part of the trial court by insisting throughout two days or discussion before the trial that he absolutely did not wish the question of Saudi Arabian law to be considered. Moreover, the courts of New York, in interpretating Section 344A, have ruled that a New York court abuses its discretion under that statute if it takes judicial notice of foreign law when it is not pleaded and particularly when the party who has the burden of proving that law has refused to provide material to the court in judicially learning it. (See cases cited in footnotes 10 and 11 of the opinion of Judge Frank, Appendix to Petition, p. 30.)

Actually Judge Frank negated his own suggestion when in the next to the last paragraph of his opinion he pointed out that " . . . it would have been in abuse of discretion under the New York cases to take notice of the foreign law here. The judgment of dismissal must therefore be affirmed" (Appendix to Petition, p. 34).

IV

Petitioner refused to discharge his obligation of pleading and proving the Saudi Arabian law and the complaint was properly dismissed.

Counsel for the petitioner captions his first argument thusly "that his right to recovery is founded on the basic and fundamental doctrine of negligence, a legal wrong which may be assumed to create an obligation in any civil-

ized country. That, therefore, the plaintiff need not allege the "law" of the country in which the occurrence took place, and the Trial Court should apply the basic and fundamental rules of common law negligence" (Petition, p. 7).

This statement represents a complete departure from the rule of *lex loci*. In brief, it requests an extension of the common law to all the world.

While literally thousands of cases can be cited to refute this, a few will suffice.

One very much in point, since it involves an automobile accident in a foreign nation, is that of *Liechti* v. *Roche*, 198 F. 2d 174, wherein Judge Rives repeated the universal rule:

> "Several applicable principles of law are too well settled to admit of serious dispute. The court is called to enforce a cause of action that has arisen under and been created by the law of the Republic of Panama, Cuba R.R. Co. v. Crosby, 222 U. S. 473, 478, 32 S. Ct. 132, 566 L. Ed. 274. The measure of damages, as well as the right to recover, is governed by the lex loci delectus, Western Union Telegraph Co. v. Brown, 234 U. S. 542, 547, 34 S. Ct. 955, 58 L. Ed. 1457, Slater v. Mexican National R.R. Co., 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900. Neither the District Court nor this Court takes judicial notice of the laws of the Republic of Panama, but such foreign laws must be pleaded and proved as facts. . . ."

The fallacy of plaintiff's argument is easily exposed. It is in the unwarranted assumption that there exists a so called basic and fundamental doctrine of negligence without reference to the situs of the negligence.

The term negligence itself embraces a dynamic and ever-expanding area in the field of human and economic relations. Wrongful death actions, interference with economic

relations and the law of automobile negligence are just three examples of actions which were unknown to even the common law until comparatively recently. In fact they are usually creations of enabling statutes such as Section 130 of New York Decedent Estates law and Section 59 of its Vehicle and Traffic Law. As an example of a new tort the latter imputes liability to an absent owner of a vehicle when used with his permission. New York's next door neighbor, New Jersey has no such law.

In the instant case, there are many steps involved before the defendant's negligence can be established, even under the common law. For example no automobile accident of this type can be viewed with reasonable perspective without reference to the rules of the road under which both drivers should have been operating their vehicles. Speed regulations, right of way rules, traffic direction rules, number, type, intensity and hours of use of lights to name but a few, are not even uniform within the 48 states, let alone foreign nations.

Obligations of non-operating owners, both present and absent, vary, and depending on the state, are imposed under common law development or superseding statutes.

Questions of contributory negligence, comparative negligence, active or passive negligence, and imputed liability control not only the right to recover, but the amount and nature of the recovery as well as the identification of the one ultimately responding in damages.

Even the presence or absence of a rule of respondent superior cannot be presumed since different nations take diverging views. Even within the doctrine itself, there are subordinate elements which may forestall its application, such as the case where the servant departs from the masters business, however momentarily, or does an act contrary to such specific instructions as to constitute a de-

parture. Even more minutely, there are subtle distinctions between that which constitutes mere deviations as opposed to complete abandonment.

The only authority cited by the plaintiff in support of his petition is based on the use of dicta in several leading cases which otherwise refute completely the claim that in this case the *lex loci* does not apply. *Cuba R.R.* v. *Crosby*, 222 U. S. 473, is probably the leading case on this subject.

In that case, Mr. Justice Holmes was considering a tort which occurred in Cuba, a nation which had not inherited the common law. This too was a negligence case for personal injuries. The accident occurred in Cuba and the suit was brought in the United States. Crosby had been injured by defective machinery. Prior to the accident he had warned his employer of the defect, but had been ordered to use his machinery until the repairs were made.

The tort involved was one well known to the common law. The suit which was brought in the United States neither pleaded nor proved the law of Cuba and the trial court applied the common law. The verdict for the plaintiff was reversed and the complaint dismissed.

Mr. Justice Holmes first reaffirmed that the rule of *lex loci* applied:

> "With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 447, 456. . . . That and that alone is the foundation of their rights.
>
> * * * *
>
> "We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right

> to recover stands upon that as its necessary foundation. It is a part of the plaintiff's case, and if there is reason for doubt, he must allege and prove it."

In the *Cuba* case the tort involved, considerably antedates the automobile. Since there was reason to doubt that Cuba provided the same redress as did our own system the complaint was dismissed since the foreign law was not proven.

Plaintiff argues that the case is not applicable inasmuch as employee relationships were involved taking the tort out of the rudimentary class. Actually the fact that an employee-employer relationship existed made the relief sought even more reasonable since the circumstances were more aggravated than in the instant case.

Crosby was an employee with a consequent restriction in his conduct. The possibility of the accident was transmitted to the defendant who therefore could have avoided it. The misconduct approached the wilful, without contributory negligence on Crosby's part.

Walton on the other hand was operating a vehicle under conditions of limited visibility and certainly his conduct is not free of questions of contributory negligence.

Crosby was refused relief and in doing so, Mr. Justice Holmes warned that we cannot presume that our laws are everywhere the same. Rights of recovery known to us only reflect our attitude and they may not be extended to foreign torts without due proof.

As already pointed out, the automobile tort involved in this case with its many factors is a far cry from the rudimentary tort of assault or conversion contemplated in the statement of Chief Justice Holmes.

New York decisions have followed the rule of the *Cuba Railroad case.* In the case of *Christie V. Cerro De Pasco Copper Corp.,* 214 App. Div. 820, 211 N. Y. S. 143, aff'd

243 N. Y. 557, 154 N. E. 603, the plaintiff was refused recovery. He sued for personal injuries received because a defective railing on a house caused a fall. The accident occurred in Peru but Peruvian law was neither pleaded or proven.

To the same effect was *Riley* v. *Pierce Oil Corp.*, 245 N. Y. 152, 156 N. E. 647, which involved a conversion of property in Mexico.

Lichti v. *Roche*, 198 F. 2d 174, like the present case, was a personal injury action arising from an automobile accident which occurred in the Republic of Panama.

Since the case was tried in a United States District Court, the question of Panama law arose. Significantly in this case the plaintiff, though in the same position as Walton, pleaded and proved the law of Panama both as to the right to recover and the measure of damages.

The case establishes quite clearly that in automobile negligence cases the rights and remedies of the parties are to be administered by the *lex loci*. In addition it establishes that the measure of damages is as important an ingredient of the plaintiff's case as any other element and that compensatory damages as we know them may vary from the rule of damages of the *lex loci*.

Petitioner relies upon the statement of Mr. Justice Holmes in the *Cuba Railway* case to the effect that in certain rudimentary torts such as battery or conversion our "courts would assume a liability to exist if nothing to the contrary appeared".

However, the very circumstances of this occurrence on a fog shrouded desert road are so foreign to and devoid of any of the elements of assault or battery as to make ludicrous exaggerated references in this direction in the hope of cloaking the situation with some of the benefits for him that might be identified with "rudimentary torts".

There is no disagreement between the parties or between the parties and the Court of Appeals to the effect that in the case of a tort occurring where there is no law, the Courts of the United States in disputes between their own citizens would apply the law of the forum.

Where petitioner begs the question, however, is in the forced application of the term "rudimentary tort" to a very much disputed automobile accident. The rudimentary torts heretofore referred to by Mr. Justice Holmes in the *Cuba Railway* case were confined to embracing only the torts of assault, battery and conversion. These might permit disposal, without injustice, by common law rules without reference to the *lex loci,* though even here we note that the New York Court of Appeals denied the application to a Mexican conversion involving real property rights. *Riley* v. *Pierce Oil Corp.,* 245 N. Y. 152, 156 N. E. 647.

The tort, however, with which we are concerned is a far cry from assault, and we note that even the few British cases which indicate that under some circumstances they might dispose of controversies between their own subjects by reference to their own law, indicate that in the case of automobile accidents they would go to the *lex loci* to determine the rules of the road. *The Halley,* L. R., 2 P. C. 193.

In addition the Judges of the Court of Appeals were unanimous when they decided that they did not agree with the plaintiff's claim that the applicable tort principles in this case were rudimentary. Judge Frank in the opinion put it thusly:

> "Plaintiff, however, argues thus: The instant case involves such rudimentary tort principles, that the judge, absent a contrary showing, should have presumed that those principles are recognized in Saudi Arabia; therefore the burden of showing the contrary was on the defendant, which did not discharge that

> burden. But we do not agree that the applicable tort principles, necessary to establish plaintiff's claim, are rudimentary: In countries where the common law does not prevail, our doctrines relative to negligence, and to a master's liability for his servant's acts, may well not exist or be vastly different.
>
> Consequently, here plaintiff had the burden of showing, to the trial court's satisfaction, Saudi Arabian 'law'." (Appendix to Petition, p. 31.)

Actually many of the cases cited by the petitioner support the defendant's contention. It is noteworthy that most of the cases cited do not present the fact situations which were involved and instead rely on culling language from the decisions without reference to the question before those courts for decision.

The bulk of them are maritime cases, and all antedate *Klaxon Co.* v. *Stentor Electric Mfg. Co. Inc.*, 313 U. S. 487. They are hardly appropriate authority in tort cases.

There is in the United States a general body of maritime law which is unique to the Federal common law. The maritime cases cited by the petitioner were commercial cases and could be disposed of by application of commercial maritime principles. In addition, the question of the *lex loci* arose in the disposition of a subordinate point contrary to the present case where the very existence of the plaintiff's cause of action is dependent upon the *lex loci*.

Even in Federal maritime cases of more recent origin there is every indication that the Federal courts still look to the *lex loci* to determine the isues between the parties. *Ozanic* v. *U. S.*, 165 F. 2d 738.

Empresa Agricola Chicama Ltda. v. *Amtorg Trading Corporation*, 57 F. Supp. 649 and *Rowan* v. *Commissioner of Internal Revenue*, 120 F. 2d 515, are cases wherein the

only fair interpretation of the decision is to the effect that the moving parties seeking relief were refused the relief requested because they had failed to plead and prove the *lex loci.*

The petitioner has not cited one single case of a tort which in any way even hints that upon the mere statement that there is no law in the nation where the tort occurred, *ipso facto,* requires the matter be disposed of under common law principles.

Savage v. *O'Neil,* 44 N. Y. 298; *Monroe* v. *Douglass,* 5 N. Y. 447; *Hynes* v. *McDermott,* 82 N. Y. 41, cited by the petitioner were not negligence cases. *Hynes* v. *McDermott* involved construing the validity of a marriage and the legitimacy of children. In the absence of proof that the marriage was invalid under foreign law, New York was eager not to brand either the marriage or the children as illegitimate.

Monroe v. *Douglass,* an 1851 decision, involved title to Scottish real estate, another common law nation. A property right was involved, and in order to resolve the matter in the absence of pleading and proof of the foreign law, New York presumed its own was the same. In the case of common law nations, this is probably not unwarranted, particularly in view of the fact that the plaintiff's whole cause of action was not, as in the present case, created only by foreign law.

Savage v. *O'Neil,* an 1871 action, also involved property rights, and the foreign law question was a very subordinate point, which once again did not involve the plaintiff's right to bring the action. The property right located in New York had to be disposed of, and the Court, quite understandably, applied its own law.

In answer to the purported question that there is no New York decision on the subject, we merely point out

in addition to the cases already cited, those cases included in footnotes 12 and 13 of Judge Frank's opinion (Appendix to Petition, p. 31).

CONCLUSION

Wherefore, the respondent prays that the petition be denied, and that a Writ of Certiorari be refused.

Respectfully submitted,

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